United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-4202

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ZIM TEXTILE CORP.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR ENFORCEMENT

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STATEMENT OF THE ISSUES PRESENTED

1. Where the only circumstances that could possibly distort election conditions within the meaning of the Gissel [1] doctrine was the indefinite layoff of the junior warehouseman, reducing the unit to one warehouseman and one clerical worker, and the layoff has been found by the Board to be economically justified and not an unfair labor practice,

a) Whether it was proper for the Board to issue a bargaining order superseding the Regional Director's Direction of Election, and,

b) Whether the clerical worker Linda Balmeo was not wrongfully deprived by the bargaining order of her Section

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1. N.L.R.B. v. Gissel Packing Co. (1969) 395 U.S. 575

7 rights to express her union preferences in a Board conducted election.

2. Whether the reiteration, on March 28, 1974, after employer knowledge of union interest in the shop's warehouse employees, of a promise made to the senior warehouseman Israel Colon to place him on the Company's Blue Cross-Blue Shield medical benefits plan in the open enrolment period of July 1974, constituted a violation of section 8(a)(1) of the Act.

Statement of the Case

a) The Sequence of Official Proceedings

On April 3rd, 1974 District 65, Distributive Workers of America ("Union") filed its representation petition (Case No. 2-RC-16475) at the New York Regional office of the Board requesting a unit of 3 "shipping, receiving, stock, office, production and maintenance" employees (A. 72)[2]. Union representatives had visited the shop twice before claiming to represent the "boys", in late February-early March 1974 (A. 132,133), and on March 28, 1974 (A. 133, 13,14). At the end of the March 28th visit, Union representative Ralph Passman remarked to Zim's Martin Zell, "I see we are going to have to file." (A. 14)

On the morning of April 4th, 1974 Zell received a copy of the Union's petition in the mail. For reasons more fully hereinafter explained, the receipt of the petition touched off an angry altercation between Zell and the warehousemen Colon and Nelson Vega, Jr., and Zell fired them on the spot

2. "A" references are to pages of the printed appendix.

(A. 50,51). Counsel was retained that afternoon and Zell immediately called Passman asking to arrange for the return to work of the two warehousemen, which they did the following morning without any loss of pay (A. 141,142).

At the end of the working day of Thursday, April 11, 1974, the junior warehouseman Vega was laid off for lack of work, pursuant to a Company decision to do so made in February, 1974 (A. 48).

A hearing in the representation proceeding was held on April 17, 1974 at which Mr. Passman appeared and Messrs. Zell, Colon and Vega testified (A. 85,86). In the course of stating the Union position, Mr. Passman said:

> "I would like to state that the approach of the union on behalf of the unit was made after three employees had joined the union.
>
> "We feel that the layoff which has occurred to now change the picture in which the unit was established, we believe is unfair and we think that the employee who was laid off basically was not laid off in good faith and that this question of only employing one employee is not true, that the company has always operated with two in the shipping department and to say now that they foresee a bad seasons * * * is, as far as we are concerned, not to be a fact and not to be a reason for stating that the company needs two people in the shipping department." (A.90)

On April 26, 1974 the Regional Director issued his Decision and Direction of Election (A. 73-76) in which, in a carefully reasoned footnote 3, he ruled that Vega's layoff was of indefinite duration and that he was therefore not eligible to vote in the election.

On May 6th and 10th the Union filed its Original and First Amended Charges respectively in this proceeding (A. 1). Complaint issued on June 6th, 1974 (A. 56-61), and, on June 17, 1974, Respondent ("Zim") filed its Answer (A. 66-70).

Meanwhile, on June 4, 1974 the Union requested withdrawal of its representation petition (A. 80), and, on June 7th, the Regional Director vacated his Decision and Direction of Election (A. 81). Thereafter, on June 24, 1974, Zim filed its petition for an election (2-RM-1715), but the Regional Director promptly dismissed the proceeding on June 26, 1974 (A. 82,83).

This matter came on for hearing before Administrative Law Judge Sidney D. Goldberg ("ALJ") on July 10 and 11, 1974, and his Decision and Recommended Order was issued on January 6, 1975 (A. 3-35). To the Decision of the ALJ, Zim took Exceptions on February 13th, 1975 (A. 36-47) and the Board panel, on June 6, 1975, issued its Decision and Order (A. 48-55) here sought to be enforced.

b) The Complaint and the Answer - the First Round of Issues

It is essential to consider the issues presented by the pleadings for both a background understanding of the case as well as the issues that are still lively. The Complaint (A. 56-61), for unfair labor practices, alleges:

(1) In paragraph 7(a) and (b) that in November, December 1973 and January 1974, Colon and Vega sought, in discussions with Zell, to obtain better working conditions and stated they would otherwise seek union representation, and for this latter, were threatened with discharge were they to seek out a union.

(2) In paragraphs 5, 8-10, 16-20, that the Union having obtained signed pledge cards from a majority of Zim's employees in a unit inclusive of warehouse and clerical employees, did, on March 28, 1974, request exclusive bargaining rights for

such a unit, which Zim wrongfully refused.

(3) In paragraphs 11 through 13, after the Union filed its representation petition, that Zell, on April 4, 1974, by illegal interrogation, determined that the Union represented a majority in the bargaining unit, fired Colon and Vega for their Union adherence thus disclosed, but restored them to their former positions the next day.

(4) In paragraph 14, that on April 11, Zell discriminatorily refused to pay the employees the customary holiday pay for Good Friday, April 12, 1974.

(5) Finally, and in our view the key allegation of the Complaint from the standpoint of supporting a bargaining order, in paragraph 15, that on April 11, 1974, Zell discriminatorily laid off Vega and refused to recall him because of his adherence to the Union.

The Answer (A. 66-70) denied all of the allegations of commission of unfair labor practices, except the section 8(a)(3) and (1) violations in connection with the discharges of April 4, 1974, related the events - between March 28 and April 1, 1974 - which now loom so importantly in the Board's case, asserted the right of the office clerical employee to a voice in a Board election (A. 66, par. 2), reiterated the fact of the Union's participation in the representation proceedings after all of the alleged unfair labor practices were supposed to have been committed (A. 70), and further alleged what still seems obvious to us:

> "20. Such unfair labor practices as were committed from the time of the filing of the representation petition were isolated in a single incident of April 4, 1974 and promptly voluntarily remedied in such a way as to bolster rather than undermine the adherence of employees to District 65."

c) The Trial before the Administrative Law Judge and his Decision

Hearings were held on July 10 and 11, 1974; again the witnesses were Colon, Vega, Passman and Zell (A. 91-158). The upshot was the ALJ's Decision of January 6, 1975 (A. 3-35) which dismissed the Complaint with respect to the commission of unfair labor practices prior to the Union's appearance and also with respect to the Good Friday pay issue (A. 13, 23-27). However with respect to the Vega layoff of April 11, 1974, the ALJ found the layoff to have been discriminatorily accelerated and premature; not justifiable sooner than May 17, 1974 (A. 19-23). The altercation and discharge incident of April 4th, 1974 was fully credited by the ALJ as supporting a section 8(a)(5) bargaining order as an "interrogation", a "polling", an "imposed agreement" on an alternate means of determining the majority status of the representative under the principles of Sullivan Electric Co. (1972) 199 NLRB 809, as well as the requisite distortion of election conditions justifying a bargaining order under the principles of N.L.R.B. v. Gissel Packing Co. (1969) 395 U.S. 575 (A. 16-18,27,28). With respect to the prompt reinstatement with full backpay - all that the Board would give remedially - the ALJ was stony faced against the election process:

> "Respondent concedes that, by Zell's actions, it violated Section 8(a)(3) * * *but it argues that its prompt corrective action in reinstating the two employees on the following day and its payment to them of their full wages without deduction for the interim period, effectively remedies its unlawful conduct. This argument is acceptable only to the extent that it obviates the necessity for an order directing reinstatement and providing reimbursement for that particular period: the manifestation of respondent's union animus and this demonstra-

tion of the lengths to which it would go in giving effect to that animus have not been expunged. * * * " (A. 17)

Finally, the ALJ, by accepting General Counsel's narrow amendment of the Complaint with respect to a promise of medical benefits, expanded it far beyond its scope so as to beef up a pattern of "post demand interference" for the purpose of supporting a bargaining order (A. 15,16; 30, Conclusion of Law no. 4).

Zim's Exceptions to the ALJ's Decision (A. 36-47) summarize what we regard as the errors of the ALJ's Decision, and also submit what we feel are cogent arguments for withholding a bargaining order in this case.

d) The Board's Order

In a sense the present Order (A. 48-53), here sought to be enforced, epitomizes the anti-Gissel stance of a Board which distrusts and dislikes its own election processes. Against the reality of the staunch, unfaltering support given their Union by Colon and Vega ever since April 4, 1974, as any cursory inspection of unfair labor practice and representation minutes would reveal, the Board's bargaining order, perhaps characteristically in an age so given over to the a priori, now rests on a base so palpably contrary to fact as to be a monument to vengeance, not to remedy:

" * * * Respondent discharged Colon and Vega, under the conditions described above, in violation of Section 8(a)(3) and (1). Respondent contends that these discharges do not stand in the way of a free election because, after consulting with an attorney, Respondent reinstated the employees without any loss in pay. However, as we have held, the effect of such discharges is not so easily eradicated. Vernon Devices, Inc., 215 NLRB No. 62 (1974). An employer's demonstrated willingness to employ extreme measures to defeat a union cannot help but have a lasting and telling effect. Employees will certainly understand and remember the harsh treatment visited on them as a re-

sult of asserting their rights and may draw back from again asserting those rights. A free and fair election in these circumstances is unlikely. * * * " (A. 52)

If Vega was legitimately laid off without the commission of unfair labor practices as the Board has now found, (A. 48-50), who can doubt that Colon would have voted his own preference and Balmeo her own preference in a perfectly free and fair election?

The Board also, wisely, avoided an application of Sullivan Electric Co. (1972) 199 NLRB 809, to the facts of this case (A. 50,51). To fasten bargaining obligations upon an employer by unsolicited employee proclamation, vide Colon's voluntary, non-responsive, desk pounding declaration, "I don't give a ----, I want a union!" (A. 140), is, of course, to turn Gissel around and put statutory arrangements, such as section 8(b)(7)(C) in disarray. Without excusing the ugly harangue and argument of the morning of April 4, 1974, nor attempting to minimize the seriousness of its impact but for the prompt amends, it was still not an "interrogation" of employees "concerning their support for the Union" (A. 52). Nor is Zell's pre-April 4th conduct so reprehensible, as the record bears out, as to even constitute a marginal violation of section 8(a)(1) of the Act; the fact is that Colon has a penchant for manipulation.

In sum, since the Union's departure from its representation proceeding and the Regional Director's from his Direction of Election, a couple of years have elapsed in which the Complaint has been stripped of all of its post reinstatement unfair labor practice charges including the only one which, in our view, was capable of sustaining a bargaining

order for distortion of election conditions, viz., the allegedly discriminatory layoff of Vega on April 11, 1974. Also gone are all of the original complaint's allegations of unfair labor practices in the pre-union scene (A. 57, par. 7(b), of wrongful refusal to bargain on March 28, 1974 (A. 58, par. 10), of interrogation and polling determinative of a binding obligation to bargain with a majority representative (A. 58, par. 12)

All that remains is the ugly harangue and discharges of the morning of April 4, 1974 in which the Employer violated sections 8(a)(3) and (1) of the Act, speedily remedied, on the advice of counsel, by prompt reinstatement with full backpay, a fact which the Board seems to resent deeply, plus an amendment asserting an 8(a)(1) allegation of a promise of hospitalization benefits if the warehousemen would abandon the Union (A. 152), outrageously puffed and blown up by both the ALJ (A. 15,16) and the Board (A. 51,52).

The structure is too tenuous to support a bargaining order and an abandonment of an election as the preferred route in which each employee, warehouse and clerical, has an opportunity to express their own preference.

ARGUMENT

POINT I

IT WAS AN ABANDONMENT OF THE PRINCIPLES OF GISSEL PACKING CO. (1969) 395 U.S. 575, TO HAVE SUPERSEDED THE DIRECTION OF ELECTION WITH A BARGAINING ORDER.

A. The Board Finding of the Legitimacy of Vega's Layoff And the Non-Commission of Any Unfair Labor Practices After the Reinstatement of the

Warehousemen Eliminated Any Distortion of Conditions Such as Would Make a Fair Election Unlikely.

In this case where demand to represent the warehouse and office clerical bargaining unit, here sought to be implemented by a bargaining order, was first voiced in a Union petition in representation proceedings (A. 126,127), we rely on N.L.R.B. v. Gissel Packing Co. (1969) 395 U.S. 575. That case (or, more accurately, group of cases) deals primarily with the role of a card majority as the basis of a bargaining order or bargaining obligation in the series of situations therein related - and this is not, at bottom, a case where cards were ever tendered or offered to be tendered to back up a bargaining demand. Nevertheless Gissel, by clearly indicating that representation proceeding elections are the preferred mode for determining the representative status of a union, e.g.,

> " * * * The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective - perhaps the only - way of assuring employee choice. * * * " (395 U.S. at 602; see also pp. 596 and 600),

has also indicated that the statutory section 9(c) processes, once invoked, are not lightly to be yielded except for employer unfair labor practices so substantially disruptive of the election process as "to have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside * * * " (id., p. 610).

The upshot of Gissel (and even prior to it, e.g., Aaron Brothers, 158 NLRB 1077) has been a requirement for Board evaluation of the disruptive actualities of committed unfair labor practices, e.g., Schrementi Bros., Inc. (1969) 179 NLRB 853 and Stoutco (1970) 180 NLRB 178, where committed unfair labor practices were Board evaluated and corrected, but with a deliberate avoidance of the harsh bargaining order remedy. See, also, Blade-Tribune Publishing Company (1970) 180 NLRB 432, on a voluntary remand from the Ninth Circuit, 71 LRRM 3104, and May Department Stores (1974) 211 NLRB No. 14, where measures short of bargaining orders were taken in the interest of preserving the election processes. On the other hand, no one can quarrel with a bargaining order for a majority union where discharges persisted in and reinstatements refused mar the scene, e.g., Petrolane Alaska Gas Service, Inc. (1973) 205 NLRB 68, Four Winds Industries, Inc. (1974) 211 NLRB No. 60, Mead Corp.(1974) 211 NLRB No. 67.

But the bargaining order is a drastic remedy, and, where misapplied, is no remedy at all but a negation of rights. For that reason the Court of Appeals in this and other Circuits has been insistent that Board bargaining orders demonstrate real and substantial reasons for the imposition, and have not hesitated to refuse enforcement where the actualities of distortion of election conditions calling for the remedy were not substantial enough, e.g.,

N.L.R.B. v. General Stencils, Inc.(2 Cir. 1971) 438 F. 2d 894 (remanding) and (1972) 472 F. 2d 170 (denying enforcement)

Peerless of America, Inc. v. N.L.R.B. (7 Cir. 1973) 484 F. 2d 1108

While it is, of course, true that considerable latitude must be accorded the Board in its administrative domain, vide, Donovan v. N.L.R.B. (2 Cir. 1975) 520 F. 2d 1316, this does not betoken an abdication by the Court of Appeals from the review jurisdiction given it by statute. And footnote 6 to Friendly, J.'s opinion in N.L.R.B. v. World Carpets (2 Cir. 1972) 463 F. 2d 57, 62:

> "6. Although Gissel clearly mandates a reasoned analysis by the Board as how the employer's misconduct has jeopardized the chances for a fair election in each particular case, concern has been voiced by this court, e.g., NLRB v. General Stencils, Inc., supra, 438 F. 2d at 901-905, and the commentators, e.g., Perl, The NLRB and Bargaining Orders; Does a New Era Begin with Gissel, 15 Vill.L.Rev. 106, 11-113 (1970); Pogrebin, NLRB Bargaining Orders Since Gissel: Wandering from a Landmark, 46 St. John's L.Rev. 193, 201-207 (1971), that the Board's bargaining orders since Gissel have been deficient in this respect. We continue to hope that the Board will make a more meaningful attempt to integrate findings of company misconduct with a reasoned analysis of how that misconduct jeopardized the chances for a fair election.",

sounds like perfectly valid law to-day:

> General Steel Products, Inc. v. N.L.R.B. (4 Cir. 1974) 503 F. 2d 896, going back to (1970) 445 F. 2d 1350; and to its pre-Gissel beginnings (1968) 398 F. 2d 339
>
> N.L.R.B. v. Gruber's Super Market, Inc. (7 Cir. 1974) 501 F. 2d 697
>
> N.L.R.B. v. Medical Manors, Inc. (9 Cir. 1974) 497 F. 2d 292
>
> Shulman's Inc. of Norfolk v. N.L.R.B. (4 Cir. 1975) 519 F. 2d 501

In the actualities of this case, it is palpable that the prompt, voluntary self-rectification of Zim's illegal acts of April 4, 1974 - and anything that might have been committed before - cleared the air of anything standing in the way of a free and fair election. It was for that reason that the prosecuting authority laid such great stress on

the relatively trivial refusal of Zim to treat Good Friday as a paid holiday, and, even though the evidence of the economic motivations for Vega's layoff was so overwhelmingly compelling that both the ALJ and the Board had to make partial and full concession respectively of its justification (A. 19-23, 48-50), we feel that this, rather than the fictitious timidity of the warehousemen to again cross swords with their employer, is the real reason for the bargaining order. Thus:

> "The timing of the discharge [sic!], only a week after Respondent admittedly discharged Vega in violation of 8(a)(3) and (1) and then reinstated him, along with the other unfair labor practices found herein, does raise some suspicions as to Respondent's motivation."(A.49)

But neither of the post reinstatement charges have been sustained, the Union was and is cast in the role of their potent champion at whose request the men were reinstated, and nothing has been done by way of unfair labor practices since that reinstatement to cloud the laboratory conditions of an election. The bargaining order is not justified, the Board has not given or stated any valid reasons for its issuance, and no valid reasons for it exist.

B. The Bargaining Order Effectively Destroys the Rights of the Clerical Worker to Engage or Refrain from Engaging in Concerted Activities Under Section 7 of the Act.

Up until the filing of the representation petition of April 3, 1974, the Union's oral claims had been that they represented the "boys" (A. 13, ftn. 6); the petition expanded the unit to include the clerical worker (A. 14). Although claim was made that she had indeed signed up for the Union (A. 90), Passman later testified that the Union did not have a card for her (A. 125-127), and from there on it was

presumed by the ALJ and the General Counsel that her vote would be "no":

"JUDGE GOLDBERG: All I can see is you thought you could at that time * * * you thought you could win without it, without the globe situation.

"MR. HOROWITZ: No.

"JUDGE GOLDBERG: I didn't mean to start an argument. I think it would be better for you to make your argument.

"MR. HOROWITZ: We don't presume to own anyone's inner thoughts or consciousness in points that were made in the Gissel case between cards and a vote in a ballot box; the ballot is still the preferable thing.

"The point that I am making, and I think it is worthwhile, is that this person who was an office clerical is being here attempted in the guise of a bargaining order to be done out of a vote on her destiny." (A. 157)

All efforts to secure a vote or voice for the office clerical after the vacatur of the representation proceeding were futile. While the ALJ devoted a footnote of denial to her rights to function with respect to her representation (A. 19, 20; ftn. 14), the Board ignored her altogether notwithstanding a voluble outcry vis-a-vis her rights in the Exceptions (A. 36-47; nos. 3,4,14,16,17).

The Supreme Court, in N.L.R.B. v. Savair Mfg. Co. (1974) 414 U.S. 270,278, has, per Douglas, J., observed:

"Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to 'form, join or assist' unions, but also the right "to refrain from any or all such activities.' 29 U.S.C. § 157."

The gross impropriety of treating the office clerical worker as though she were an inanimate sack without rights is manifest in the attitude of the ALJ:

" * * * Since there is no evidence in this case that the office clerical employee had signed an authori-

zation card for the union or expressed any interest in it, it is a fair inference that respondent believed that she would not vote for it. With Colon, who was likely to vote for the union, as the only other employee, respondent would have good reason to expect the election to result in a tie vote of 1 to 1, -- insufficient to constitute a majority for the union." (A. 20,21).

There are no second class citizens in the ranks of employees enfranchised by the Act, and where, as here, a vital building block for the bargaining order is the guess that Linda Balmeo would not vote "right", it ought not to stand.

POINT II

THE BOARD AND THE ALJ ERRED IN ALLOWING THE POST HEARING AMENDMENT OF THE COMPLAINT AND IN FINDING THE COMMISSION OF ANY SECTION 8(a)(1) UNFAIR LABOR PRACTICE IN IT.

The only motion to amend the Complaint was made by General Counsel after the hearing, and was an extremely limited one:

"MR. TRUNKES: Before I start the oral argument, I would like to make a motion.

"I would like to make a motion to amend the complaint to include an 8(a)(1) allegation, that Mr. Zell promised hospitalization benefits providing that the union employees abandon union District 65. *** " (A. 152)

Yet on that structure the ALJ, the Board, and now Counsel for the Board prosecuting these enforcement proceedings have built an incredible structure of what might be characterized as un-unfair labor practices having the same effect and application. Thus the events of Friday, March 29, 1974 and of Monday, April 1, 1974, while purportedly not the basis for any findings and certainly not pleaded in the complaint whether originally or by amendment, are nevertheless used as the heavy

background basis of 8(a)(1) violation justifying a bargaining order. Thus the ALJ:

> "The facts concerning Zell's offer of medical and pension benefits to Colon and Vega are undisputed. Zell's own testimony shows that he made these promises as an express alternative to the benefits that the employees could obtain through the union and that he conditioned the granting of them on their support for the union. This conduct, I find, constituted interference, restraint and coercion by respondent and it thereby violated Section 8(a)(1) of the Act.
>
> "The additional pressure by Zell to coerce Colon and Vega into repudiating their support for the union, as evidenced by his request that they go to the union office for that purpose on March 29, and his effort on April 1, by the telephone call to the union, with Colon and Vega on separate extensions, to compel them to withdraw their support, are not alleged as separate unfair labor practices and, therefore, no findings are made concerning Zell's conduct on those occasions." (A. 16)

But:

> " * * * in this case respondent's conduct: (a) in interfering with its employees protected concerted activities following the union's appearance on March 28; (b)its undisputed pressure on the employees on April 1 to repudiate the union (although not found to be independent unfair labor practices because not alleged as such in the complaint); (c) its direct polling Colon and Vega on April 3 and its prompt discharge of them for their declared support of the union; and (d) the accelerated layoff of Vega on April 11; sufficiently pervade the atmosphere to make the holding of a fair election impossible. * * * " (A. 28)

And:

> "As fully detailed by the Administrative Law Judge, Respondent here unlawfully offered medical, pension, and other benefits to employees on the condition that they withdraw support from the Union and coercively interrogated employees concerning their support for the Union. * * *" (A. 51,52)

Again, remembering that we are addressing ourselves to a motion to add an allegation of an illegal offer of hospitalization benefits, the actualities spell out a promise by Zell to Colon, made in December, 1973 to enroll him in the company's Blue Cross-Blue Shield medical benefits plan

when it opened for new enrolment in July 1974 the next anniversary date; thus Zell:

" It was some time in December /1973/, not too much before Christmas. * * * I had my car in the City * * * and I offered him a lift * * *

" * * * he told me his wife had just gotten a job * * * that he was now not eligible for Medicaid benefits or Medicare benefits, I don't know the difference * * * .

"I told him at that time that we had Blue Cross, Blue Shield in the place. I had offered it at the time to place him on Blue Cross, Blue Shield.

"I also made it known * * * July first was the only time that I may or could have placed him on that.

* * * *

" * * * I told him /Colon/ that on the anniversary date I would put him on the Blue Cross, Blue Shield." (A. 130,131)

Colon was a welfare cheat who had withheld his correct social security number from his employer until January 1974 (A. 107,108). Nevertheless he testified to asking for medical benefits in toward the end of 1973; and, after first testifying to refusals, he finally corroborated Zell's promise:

" * * * in November, right, that I had started talking to him /Zell/, at that time, now that I remember well, he told me that the next time that the Medicaid would come in, he would seek to get me on the medical benefits." (A. 107)

That Colon could manipulate, provoke, make a deal, wheel and deal - contrary to the basket case configuration of the American worker depicted by the 8(a)(1) objects - is well illustrated:

"Q. What did you tell Mr. Zell the second time? A. That I had already gone to the union and done -- talked to somebody that they were going to -- just to see what would happen.

* * * *

"JUDGE GOLDBERG: What did he say?"

"THE WITNESS: When he told me that, I don't care what you do, but if the old man finds out, he will fire you."

"JUDGE GOLDBERG: This was the second conversation?"

"THE WITNESS: The second time."

"Q. And this occurred before you went to the union? A. This is before I went to the union.

"Q. But you told him you did go to the union? A. Yes.

"And that was not so? A. That was not so." (A.98)

Hence, when, on the afternoon of March 28, 1974, Zell and Colon spoke again of medical benefits, Zell would only reiterate his promise of the previous December:

" * * *As I stated, I never said that I was prepared to do anything. We had been working since February of '73 on placing a pension plan into the operation of the business. Nothing had been approved and I wasn't prepared to make any guarantees to anybody, least of all myself, that we would have a pension plan, which as of to-day we still don't have.

"What I promised Mr. Colon and not Mr. Vega was the day that I drove him to meet his wife, that the next anniversary date of our Blue Shield Blue Cross policy, which he knew full well was July 1st, I would instate him -- I would place him into that policy."

"/Q7 Didn't you state to -- or, did you state to Mr. Colon during this conversation that the reason why you were not putting him into the Blue Cross Plan was because of the union matter? A. No, not at all.

"Q. Didn't you state to him that you didn't put him in the plan because of the start of the union thing? A. No, I made it very clear to Mr. Colon that if a union did come into Zim Textile, that any Blue Cross, pension, or profit sharing or any other plan that we might institute, he probably would not be able to benefit from because the union themselves have their own health and welfare and pension plans and whatnot." (A.145)

This was corroborated by Colon:

"He /Zell7 started telling me , well, look, I got medical benefits and some pension plans I'm trying to get together and he showed me a whole bunch of papers stating the plans he had, and I said, you know you have been trying to do this and you haven't done it.

"I guess the only way I can do something is with the union and I did it this way.

"He says, well, look, what is it that you want, and I told him that I want medical benefits and some better

conditions.

"He says if I promise that I can get you something like this, would you forget about the union.

"I said if you can get me these things, I don't need the union." (A. 102, 103; emphasis supplied).

The specific amendment therefore is a mere reiteration of a pre-union promise to enroll Colon in the Company's medical insurance plan, modified by the Union's appearance on March 28th in the sense that their own plans would have duplicating hospitalization benefits. Given those circumstances, under the Board's own doctrine as expressed in Essex International, Inc. (1974) 211 NLRB No. 112, the amendment of the complaint related to matter - hospitalization benefits - which , in the circumstances of the case, could neither constitute an unfair labor practice nor a ground for setting aside an election since, per Essex, "We believe instead that the statement made was designed simply to call attention to an existing policy adopted in advance of the election."

With respect to the pension benefits, it is quite clear that no promises whatever were made.

Thus of all of the charges,the only unfair labor practices pleaded and proved were the violations of sections 8 (a) (1) and (3) in the discharges of April 4th, 1974, quickly and completely remedied upon terms which could not discredit the Union nor impair the conditions of a free and fair election.

This Brief should not close without some comment on the anti-lawyer demagoguery that runs like a thread through this case. As it emerged from the Board on its way to these

enforcement proceedings, it was quite apparent that, thanks to its retention of counsel, a clearly illegal and disastrous course of conduct on Zim's part was stopped in its tracks, as completely and thoroughly rectified as the Board itself, by compulsory mandate, would require, and that no unfair labor practices have been committed since that retention. It seems a pity that the tax supported attentions of an Administrative Law Judge should turn to a study of how the consultation of counsel necessarily dissipates "the natural feelings of an employer" (Board Brief, footnote 16), or, for that matter, that the Board Brief, footnote 17, is so concerned with "the sincerity with which Zell's anti-union beliefs were held * * * "; nor was the Administrative Law Judge particularly subtle when, talking to a supposedly illegal motivation in the layoff of Vega (not sustained by the Board), he observes, "Respondent then had competent legal counsel and the inference is inescapable that it had been advised that the holding of an election would follow shortly thereafter." Such left handed compliments are gratuitous, and the lawyers handling the Board's affairs should know better, and leave the joys of the merely punitive to others.

C O N C L U S I O N

Posting the usual notice with respect to the rectified violations of Sections 8(a)(3) and(1) of the Act would, by this late date, serve no useful purpose. Enforcement of the Board's Order ought to be denied and the Complaint dismissed in its entirety.

Dated: February 10, 1976 Respectfully submitted,

MILTON HOROWITZ,
Attorney for Respondent

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, : No. 75-4202

Petitioner, :

v. :

ZIM TEXTILE CORPORATION, :

Respondent. :

On Application for Enforcement of an Order of the National Labor Relations Board. :

- -X

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the within Respondent's Brief in the above captioned case has this day been served by first class mail upon the following counsel at the address listed below:

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Dated at New York, N.Y.
this 11th day of February, 1976.